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ALI TAN SRI ABDUL KADIR & ORS

v.

SIMPANG EMPAT PLANTATION SDN BHD

B

FEDERAL COURT, PUTRAJAYA
ABDUL HAMID MOHAMAD CJ
AUGUSTINE PAUL FCJ
ABDUL AZIZ MOHAMAD FCJ
[CIVIL APPEAL NOS: 02-25-2006(A),
C 02-30-2006(A) & 02-31-2006(A)
2 JULY 2008

CIVIL PROCEDURE: *Res Judicata - Judgment - Previous suit by directors of same company involving same subject matter dismissed upon*
D *preliminary objection based on lack of locus standi - Previous suit not a final judgment after a full trial - Preliminary objection in previous suit allowed not because of any absolute prohibition but because directors did not satisfy conditions to justify them doing so - Directors not prevented from bringing present action*

E

CIVIL PROCEDURE: *Res Judicata - Law, difference in applicable law - Previous suit by directors of same company involving same subject matter dismissed - Federal Court decision in Kimlin Housing Development Sdn Bhd v. Bank Bumiputra (M) Bhd & Ors handed*
F *down after previous suit was concluded - Had Kimlin been decided before conclusion of previous suit, judgment in previous suit would have been different - Whether doctrine of res judicata prevents present suit from being instituted to take into consideration effect of decision in Kimlin's case - Requirement of law satisfied for present suit to be brought*

G In a previous action referred to as Simpang Empat No. 1, the respondent herein had claimed that the first four appellants herein (ie, the chargee and receivers and managers appointed by the chargee) had no power of sale over the charged land. In Simpang Empat No. 1, a preliminary objection was raised that the directors
H had no locus to bring the action in the name of the company because the receivers and managers had been appointed. The Federal Court upheld the preliminary objection on the grounds that it had not been shown that the action of the directors would benefit the company. Subsequently, the respondent filed the
I present action (Simpang Empat No. 2) seeking orders that the transfer of the charged land to the 6th appellant be declared null

and void and revoked. The same preliminary objection was again raised. The learned High Court Judge, following Simpang Empat No. 1, had upheld the preliminary objection and struck out the originating summons. The respondent appealed to the Court of Appeal which allowed the appeal. The Court of Appeal found that the only issue in Simpang Empat No. 1 was whether the respondents' directors could bring an action in the name of the company against the appellants. However, in Simpang Empat No. 1, the Federal Court did not decide on what the Court of Appeal called the "incidental question" which was whether receivers and managers had power to sell the said property pursuant to the debenture. That incidental question was decided by the Federal Court in *Kimlin Housing Development Sdn. Bhd. v. Bank Bumiputra (M) Bhd. & Ors.* about two months after Simpang Empat No. 2 was decided by the High Court. The Court of Appeal held that if *Kimlin* had been decided before the Federal Court handed down its decision in Simpang Empat No. 1, it would not have held that any judgment in favour of the respondent would not have benefited it. This is because if there was no power in the receivers and managers to sell the land in question, the purported sale would have been set aside thereby reverting the land to the respondent. Therefore, the Court of Appeal held that as a matter of essential justice that the issues should be re-opened because persons who are not in law entitled to have property must be made to return it. The appellants were granted leave to appeal to the Federal Court, *inter alia,* on the issue of *res judicata*.

Held (dismissing the appeal)
Per Abdul Hamid Mohamad CJ delivering the judgment of the court:

(1) In Simpang Empat No. 1, the decision of the court was based on the facts and circumstances of the case before the court then and relevant for the determination of the issue raised in the preliminary objection. It was not a "final judgment" after a full trial of the suit that would close any attempt to relitigate. The action was dismissed on the issue of *locus standi* alone, even then not because there was an absolute prohibition on the directors from bringing an action, but because they, then, did not satisfy the conditions to justify them to do so. That being so, there was nothing to prevent the directors from bringing another action. (para 21)

(2) The High Court Judge could not be faulted for not considering *Kimlin (supra)* because *Kimlin (supra)* had not been decided when the learned judge decided on the preliminary objection. However, by the time the Court of Appeal heard the appeal, *Kimlin*'s *(supra)* decision was already there. It was therefore quite right for the Court of Appeal to take it into consideration. But it should be only for the purpose of deciding the preliminary objection. The final decision on the effect must be left open for the High Court hearing the originating summons (Simpang Empat No. 2) to decide. The court then might also have to consider the effect of *Melatrans Sdn. Bhd. v. Carah Development Sdn. Bhd.* (para 32)

(3) There was, at least, an arguable case now that the sale may be void (this is a matter that should be decided by the High Court at the hearing of the originating summons). So, it followed that for the purpose of deciding the preliminary objection, the requirement of the law had been satisfied for the directors to bring the action in Simpang Empat No. 2. (para 33)

Bahasa Malaysia *Translation Of Headnotes*

Dalam satu tindakan terdahulu yang dipanggil Simpang Empat No. 1, responden di sini telah menuntut bahawa perayu pertama hingga keempat di sini (iaitu pemegang gadaian dan penerima dan pengurus yang dilantik oleh pemegang gadaian) tidak mempunyai kuasa untuk menjual tanah. Di dalam Simpang Empat No. 1, bantahan awal telah bangkitkan bahawa pengarah-pengarah tidak mempunyai locus untuk membawa tindakan atas nama syarikat kerana penerima dan pengurus telah pun dilantik. Mahkamah Persekutuan telah membenarkan bantahan awal atas alasan bahawa ianya tidak dibuktikan bahawa tindakan pengarah-pengarah tersebut boleh memanfaatkan syarikat. Berikutnya, responden memfail tindakan semasa (Simpang Empat No. 2) memohon perintah bahawa pindahmilik tanah yang digadai kepada perayu keenam adalah batal dan tak sah dan supaya pindahmilik tersebut dibatalkan. Bagaimanapun, bantahan awal yang sama, sekali lagi telah dibangkitkan. Yang arif hakim Mahkamah Tinggi, mengikuti Simpang Empat No. 1, telah membenarkan bantahan awal dan berikutnya membatalkan saman pemula. Responden merayu ke Mahkamah Rayuan yang membenarkan rayuan. Mahkamah Rayuan mendapati bahawa satu-satunya isu di dalam Simpang Empat No.

1 adalah sama ada pengarah-pengarah responden boleh membawa tindakan atas nama syarikat terhadap perayu-perayu. Bagaimanapun, di dalam Simpang Empat No. 1, Mahkamah Persekutuan tidak memutuskan mengenai apa yang dipanggil Mahkamah Rayuan sebagai "soalan berhubungan", iaitu sama ada penerima dan pengurus mempunyai kuasa untuk menjual hartanah tersebut di bawah debentur. Soalan berhubungan tersebut telah diputuskan oleh Mahkamah Persekutuan di dalam *Kimlin Housing Development Sdn. Bhd. v. Bank Bumiputra (M) Bhd. & Ors* lebih kurang dua bulan selepas Simpang Empat No. 2 diputuskan oleh Mahkamah Tinggi. Mahkamah Rayuan memutuskan bahawa jika *Kimlin* diputuskan sebelum Mahkamah Persekutuan memberikan keputusannya di dalam Simpang Empat No. 1, ia tidak akan memutuskan bahawa mana-mana penghakiman yang dibuat untuk responden tidak akan memanfaatkannya. Ini kerana, jika penerima dan pengurus tiada kuasa untuk menjual tanah tersebut, maka penjualan yang dikatakan dibuat harus diketepikan sekaligus akan mengembalikan tanah kepada responden. Mahkamah Rayuan dengan itu memutuskan bahawa sebagai satu perkara keadilan asasi, isu-isu perlu dibuka semula kerana sesiapa yang tidak berhak kepada hartanah mesti mengembalikan semula tanah tersebut. Perayu-perayu diberi kebenaran untuk merayu ke Mahkamah Persekutuan antara lain berkaitan isu *res judicata*.

Diputuskan (menolak rayuan)

Oleh Abdul Hamid Mohamad KHN menyampaikan penghakiman mahkamah:

(1) Di dalam Simpang Empat No. 1, keputusan mahkamah adalah didasarkan kepada fakta dan halkeadaan kes yang ada dihadapan mahkamah pada ketika itu dan yang relevan kepada pemutusan isu yang dibangkitkan di dalam bantahan awal. Ia bukan satu "penghakiman muktamad" selepas satu perbicaraan penuh tindakan yang boleh menghalang segala percubaan untuk mempertikai semula. Tindakan ditolak semata-mata atas isu *locus standi*, itu pun bukan kerana terdapat larangan mutlak terhadap pengarah-pengarah untuk memulakan tindakan, tetapi kerana mereka, pada waktu itu, tidak memenuhi syarat-syarat yang mewajarkan mereka berbuat demikian. Dengan itu, tiada apapun yang boleh menghalang pengarah-pengarah dari membawa satu tindakan lain.

(2) Hakim Mahkamah Tinggi tidak boleh dipersalahkan atas kegagalan menimbang *Kimlin (supra)* kerana *Kimlin (supra)* belum diputuskan semasa yang arif hakim memutuskan bantahan awal. Bagaimanapun, sewaktu Mahkamah Rayuan mendengar rayuan, keputusan *Kimlin (supra)* sudah pun ada. Oleh itu adalah betul bagi Mahkamah Rayuan untuk memberi pertimbangan kepadanya. Walaupun begitu, pertimbangan haruslah semata-mata untuk maksud memutuskan bantahan awal. Keputusan muktamad mengenai kesannya hendaklah dibiarkan kepada Mahkamah Tinggi yang mendengar saman pemula (Simpang Empat No. 2) untuk memutuskannya. Mahkamah pada masa itu harus juga menimbang kesan kes *Melatrans Sdn. Bhd. v. Carah Development Sdn. Bhd.*

(3) Kini hujah sekurang-kurangnya sudah boleh dikemukakan bahawa penjualan mungkin terbatal (ini perkara yang harus diputuskan oleh Mahkamah Tinggi di pendengaran saman pemula). Ianya dengan itu mengikut bahawa bagi maksud memutuskan bantahan awal, kehendak undang-undang telah dipenuhi bagi membolehkan pengarah-pengarah memulakan tindakan di dalam Simpang Empat No. 2.

Case(s) referred to:

Cavendish Bentinck v. Fenn [1987] 12 App Cas 652 ***(refd)***

Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd [2001] 2 CLJ 321 CA ***(refd)***

Johnson v. Gore Wood & Co (a Firm) [2001] All ER 481 ***(refd)***

K Balasubramaniam (Likuidator Bagi Kosmopolitan Credit & Leasing Sdn Bhd) v. MBf Finance Bhd & Ors [2005] 1 CLJ 793 FC ***(refd)***

Kimlin Housing Development Sdn Bhd v. Bank Bumiputra (Malaysia) Bhd & Ors [1997] 3 CLJ 274 SC ***(refd)***

M&J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor [1994] 2 CLJ 14 SC ***(refd)***

Melantrans Sdn Bhd v. Carah Enterprise Sdn Bhd & Anor [2003] 2 CLJ 86 FC ***(refd)***

Re B Johnson & Co (Builders) Ltd [1955] 1 Ch D 634 ***(refd)***

Roberto Building Material Ptd Ltd v. Oversea – Chinese Banking Corp (No 2) [2003] 3 SLR 217 ***(refd)***

Tan Ah Teck v. Coffral (M) Sdn Bhd [1991] 3 CLJ 2227; [1991] 4 CLJ (Rep) 63 HC ***(refd)***

Willis v. Willis [1941] MLJ 169 ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 192(2), 305(1)

National Land Code, ss. 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 340(2)(b), (4)(b)

For the appellant I, II & III - Leong Kok Keong (Mohamed Khairil Abidin with him); M/s Kean Chye & Sivalingam
For the appellant IV - Mohd Ariff Yusof (Abdullah Abd Rahman with him); M/s Cheang & Ariff
For the appellant V & VI - Gurbachan Singh Bagawan Singh; M/s Bachan & Kartar
For the respondent - L Sabapathy (Wong Guo Bin & S Bhuvaneswary with him); M/s Logan Sabapathy & Co

Reported by Amutha Suppayah

JUDGMENT

Abdul Hamid Mohamad CJ:

[1] Simpang Empat Plantation Sdn. Bhd. ("Simpang Empat") the respondent herein was the registered owner of the land in question. In 1990 it obtained a loan from the fourth appellant ("MBf Finance Bhd.") for RM2.5 million. The loan was secured by a debenture and a charge under the National Land Code ("NLC"). In May 1992, MBf Finance Bhd. recalled the loan and appointed the first three appellants as receivers and managers of Simpang Empat pursuant to the debenture. Simpang Empat then filed a writ against the first four appellants ie, MBf Finance Bhd. and the receivers and managers claiming that the receivers had no power of sale over the said plantation. Simpang Empat also asked for an injunction to be granted against the receivers to restrain them from proceeding with the sale of the said plantation. This suit is Kuala Lumpur High Court Civil Suit No. D4-22-1289-92. Subsequently, Simpang Empat filed an *ex parte* application in the same civil suit to restrain the receivers and managers from entering into any sale, disposal or other forms of conveyance whatsoever in respect of the said land. At the hearing of the application *inter partes*, learned counsel for the receivers and managers raised a preliminary objection that the directors of Simpang Empat had no right to bring the action in the name of the company because it was under receivership. He argued that the proper persons who had the power to bring the action were the receivers and managers. The learned High Court judge, Dato' Dr. Zakaria M. Yatim (as he then was) agreed with the submission and ruled that the directors had no power to institute the action because the receivers and managers were already appointed.

[2] However, in his written judgment given subsequently, the learned judge was of the view that he was wrong in holding that the receivers had the power to sell the property.

[3] However, on appeal to the then Supreme Court in Supreme Court Civil Appeal No. 02-45-94, the court which by then had been renamed "Federal Court" upheld the High Court judge's ruling on the said preliminary objection and dismissed the appeal. The Federal Court gave the following reasons, which is quoted in full:

> After considering submissions by both Counsel and the facts and circumstances of the case, we are of the unanimous view that the appeal be dismissed with costs to the respondents to be taxed if not agreed. Deposit to account of costs.
>
> The appointment of receivers pursuant to a debenture does not, in itself, prevent the directors of the company creating the debenture from pursuing a right of action. The directors can pursue if in doing so, it would be in the interest of the company and would not impinge prejudicially upon the position of the debenture holders by threatening or imperilling the assets which are subject of the charge. Much depends on the facts and circumstances of each case.
>
> In the present case, it has not, in our view, been shown that the action would benefit the company thereby justifying the action. Also, the directors had not given indemnity for costs. The appeal is dismissed.
>
> That case will be referred to as "Simpang Empat No. 1.

[4] In 1996, Simpang Empat filed an Originating Summons at the High Court at Ipoh *vide* Originating Summons No. 25-54-1996. Besides the four defendants in Simpang Empat No. 1, (ie, MBf Finance Bhd. and the receivers and managers), Simpang Empat added two new defendants as the 5th and the 6th defendants (appellants 5th and 6th herein). The 5th appellant was the purchaser of the said land at a price of RM4.8 million. The 6th appellant was the registered proprietor of the land from 29 September 1994. This case is referred to as "Simpang Empat No. 2." In Simpang Empat No. 2, Simpang Empat prays for the following orders:

(i) that the transfer of the property known as PN 35553, Lot No. 9108, Mukim Hutan Melintang, Daerah Hilir Perak, Perak ("the said land") to the 6th appellant be declared null and void and of no effect due to non compliance of the provisions under s. 340(2)(b) and/or s. 340(4)(b) of the National Land Code 1965;

(ii) that the registrar of title be directed to revoke the endorsement of registration on the documents of title regarding the transfer of the said land to the 6th appellant.

(iii) that the 4th appellant (MBf Finance Bhd.) be ordered to refund the redemption sum which was received from the charge *vide* presentation Bil. 9755/91, Jilid 3912, Folio 18 to the 6th appellant;

(iv) that the 6th appellant be ordered to return the document of title relating to the said land to the 4th appellant in exchange with the redemption money as stated in para. (iii) above; and

(v) that the registrar of title be directed to reinstate the endorsement of registration relating to Presentation Bil 9755/91, Jilid 3912, Folio 18 and cancel the discharge of charge.

[5] The same preliminary objection that was raised in Simpang Empat No. 1 was again raised in Simpang Empat No. 2. The learned High Court judge who heard Simpang Empat No. 2 was Abdull Hamid Embong J (as he then was). He clearly stated in his grounds of judgment that he had ruled against Simpang Empat's "proposition that the preliminary objection could be taken up simultaneously with arguments on the merits of this application". The learned judge also ruled that if the appellants succeeded on the preliminary objection, the hearing on merits of the application would not be necessary. The learned judge further stated:

> Furthermore, the plaintiff (Simpang Empat – added) had earlier agreed to have the preliminary objection heard first, and separately of the merits. They cannot now retract from that stand.

[6] So, the point that should be made at this stage is that, the merits of the case had not been heard by the learned High Court judge.

[7] The learned judge held:

> It cannot be doubted that this application, in substance, is to challenge the powers of the receivers to deal under receivership with the landed assets of the plaintiff company (although in the prayer of this Originating Summons, the relief sought is for a declaration that the transfer of the plaintiff's land to the sixth defendant pursuant to the sale by the receivers, is null and void). Put another way, the plaintiff herein (Simpang Empat – added) clearly intends to interfere with the basic functions of the

receivers, a function duly exercised pursuant to their power to sell under clause 23 of the debenture. This is clearly in contravention of one of the conditions set under Newhart Developments, and it is my finding that the directors purporting to exercise their residual powers, cannot disrupt the receivers' function. As earlier stated, although differently worded, this application is in essence seeking for the same relief as the declaration sought for in Simpang Empat No. 1, ie, that the receivers and managers do not enjoy any power of sale on the plaintiff's (Simpang Empat's – added) land.

It is my view that the matter had been put to rest by the Federal Court No. 1. I cannot, with respect, agree with Mr. Sabapathy's suggestion that this Court should exercise caution in interpreting the Federal Court's decision since it had not given full grounds for its decision. The reason given by the Federal Court, although not lengthy nor rhetorical, is clear, ie, that the directors, under the circumstances found under Simpang Empat No. 1, no longer possess the power to institute the action, since it could not be shown that such an action would benefit the company. Those circumstances, in my view, have not changed under this application in spite of Mr. Sabapathy's attempt to convince me that there was at least one material difference in that an offer for costs was made in this application to meet the indemnity qualification. However, this offer was made not by the directors personally as I feel they should, but by counsel. It was also rejected by the defendants (the Appellants herein - added) as being inadequate and qualified and I agree. As such, I find that the offer to be a non offer and thus, the company's assets remain endangered by this application.

Having considered submissions and the circumstances surrounding this application I am in agreement with defence counsels' stand that this court is bound by the Federal Court's decision. This preliminary objection is therefore upheld and the originating summons be struck out with costs.

[8] The matter went on appeal to the Court of Appeal *vide* Civil Appeal No. A-02-139-1997. The Court of Appeal allowed the appeal, set aside the order of the High Court and remitted the case to the High Court for the court to hear and dispose of the matter.

[9] This court, on 5 July 2006 granted leave to the appellants to appeal to this court on the following questions:

(1) In view of the decision of the House of Lords in *Johnson v. Gore Wood & Co (a firm)* [2001] All ER 481 (*Johnson v. Gore Wood*), to what extent the doctrine of *res judicata* stated therein is applicable in Malaysian Law?

(2) Whether the Court of Appeal ought to have applied the Federal Court decision in *Melantrans Sdn Bhd v. Carah Enterprise Sdn Bhd & Anor* [2003] 2 CLJ 86 in the appeal before it in view of the similar factual matrix in *Melantrans* and the appeal before the Court of Appeal?

(3) Could s. 192(2) of the Companies Act 1965 be relied upon in the present matter to set aside the sale of the subject land by the receivers and managers?

[10] Now, going back to the judgment of the Court of Appeal. Let me try to summarise the main points of the judgment as far as I can understand it.

[11] It started off by saying that one of the main, if not the only, issue in Simpang Empat No. 1 was whether the respondents' directors could bring an action in the name of the company against the appellants. However, in Simpang Empat No. 1, this court did not decide on what the Court of Appeal called the "incidental question" which was whether receivers and managers had power to sell the said property pursuant to the debenture. That issue, ie, the incidental question was decided by this court in *Kimlin Housing Development Sdn. Bhd. v. Bank Bumiputra (Malaysia) Bhd. & Ors.* [1997] 3 CLJ 274 about two months after Simpang Empat No. 2 was decided by the High Court (Abdull Hamid Embong J) and about three weeks after the learned judge gave his written judgment. *Kimlin (supra)* decided that a chargor of land could not by a contract – and a debenture is a contract – exclude the operation of ss. 254 to 265 of the National Land Code ("NLC"). The Court of Appeal then said:

> 4. There can be little or no doubt that if *Kimlin* had been decided before the Federal Court handed down its decision in the appeal in respect of the first suit, it would not – indeed it could not – have held that any judgment in favour of the instant appellant in the first suit would not have benefited it. This is because if there was no power in the receivers and managers (the instant 1st to 3rd respondents) (in the Court of Appeal – added) to sell the land in question, the purported sale would have been set aside thereby reverting the land to the appellant (Simpang Empat – added).

A So too, had the learned judge heard the application to strike out the amended summons in the present instance after *Kimlin*, he would have refused the application. Again, because, as a matter of precedent, *Kimlin*, as a later decision, had the effect of overreaching the decision in the first suit.

B

[12] The Court of Appeal then went on to cite at great length passages from the judgment of the Court of Appeal in *Chee Pok Choy & Ors. v. Scotch Leasing Sdn. Bhd.* [2001] 2 CLJ 321. The court then posed the question:

C So the question that is to be asked here is this: if the second suit is permitted to proceed will it favour an abuse of process? In my judgment it will not. Indeed, I am satisfied that abuse of process would be favoured rather than prevented by refusing the appellant permission to reopen the issue.

D

[13] Applying *Kimlin (supra)* and *M&J Frozen Food Sdn. Bhd. & Anor v. Siland Sdn. Bhd. & Anor* [1994] 2 CLJ 14, the court concluded:

E It follows as a matter of essential justice that the issues should be re-opened because persons who are not in law entitled to have property must be made to return it.

[14] The Court of Appeal then dealt with the argument of learned counsel for *MBf Finance Bhd.* that, if the second suit was F allowed to proceed, it would interfere with the powers of the receivers and managers. In dismissing the argument, the court referred to a passage in *Tan Ah Teck v. Coffral (M) Sdn. Bhd.* [1991] 3 CLJ 2227; [1991] 4 CLJ (Rep) 63, s. 192(2) of the Companies Act 1965, *Re B Johnson & Co. (Builders) Ltd.* [1955] G 1 Ch D 634, *Roberto Building Material Ptd. Ltd. v. Oversea – Chinese Banking Corp. (No. 2)* [2003] 3 SLR 217, *K. Balasubramaniam (Likuidator Bagi Kosmopolitan Credit & Leasing Sdn. Bhd.) v. Mbf Finance Bhd & Ors* [2005] 1 CLJ 793, *Willis v. Willis* [1941] MLJ 169, s. 305(1) of the Companies Act 1965 and *Cavendish Bentinck* H *v. Fenn* [1987] 12 App Cas 652.

[15] Then, returning to the instant appeal, the court held that "it cannot by any stretch of imagination be said that penalizing the receivers and managers for doing an act, namely selling and I transferring the subject land, they were not entitled in law to do is hardly an interference with their function. So, there is really no interference at all. It is only a question of making the wrongdoers

accountable. All that is quite in order." The court further held that there was "no question of imperilling the appellant's (Simpang Empat's – added) assets here. Quite the opposite". This is because: "If the appellant's (Simpang Empat's – added) summons proceeds to trial and terminates in the appellant's (Simpang Empat's – added) favour, then the subject land returns to the appellant (Simpang Empat – added). There is a benefit to the appellant (Simpang Empat – added) and no peril to the asset." The court then concluded:

> Taking a step back once again and viewing the facts of this case in its totality, it is clear that the justice of the case lies in permitting the summons to proceed and to have the issues reopened.

[16] It appears to me that the effect of the reasoning of the Court of Appeal is this: where the Federal Court decides in a subsequent case on a point of law (in this case, *Kimlin (supra)*) a case decided earlier by the Federal Court (in this case, *Simpang Empat No. l (supra)*) may be reopened on grounds of justice. To justify it, the Court of Appeal purported to rely on the doctrine of *res judicata* in a wider sense.

[17] To my mind, in determining whether *res judicata* applies or not, two questions must be answered. First, what was the issue decided in Simpang Empat No. 1 and what is the issue raised in the preliminary objection in Simpang Empat No. 2? Secondly, what is the relevance of *Kimlin (supra)*?

[18] On the first question, it has been shown that in Simpang Empat No. 1 the preliminary objection raised was that the directors had no locus to bring the action in the name of the company because the receivers and managers had been appointed. That too was what the judgment of this court was about. This court had said very clearly that, first, the appointment of receivers and managers pursuant to a debenture does not, in itself, prevent the directors of the company creating the debenture from pursuing a right of action.

[19] Secondly, the directors may do so if it would be in the interest of the company and would not impinge prejudicially upon the position of the debenture holders by threatening or imperilling the assets which are the subject of the charge. That depends on the facts and circumstance of each case.

[20] Thirdly, having laid down the principle, it considered the facts and circumstances of the case before it, then. The court then concluded that it had not been shown that the action of the directors would benefit the company and was therefore justified. Furthermore, the directors had not given the indemnity for costs.

[21] So, the decision of this court then was based on the facts and circumstances of the case before the court then and relevant for the determination of the issue raised in the preliminary objection. It was not a "final judgment" after a full trial of the suit that would close any attempt to relitigate. All that the court said was that based on the facts and circumstance then before the court the directors had not shown that they had satisfied the requirements laid down by the court. The action was dismissed on the issue of *locus standi* alone, even then not because there was an absolute prohibition on the directors from bringing an action, but because they, then, did not satisfy the conditions to justify them to do so.

[22] That being so, in my view, there is nothing to prevent the directors from bringing another action. Whether they would succeed or not depends on whether, now, they could satisfy those conditions.

[23] That is what we should be looking at. Has there been shown now (in Simpang Empat No. 2) that the directors had satisfied those conditions?

[24] First, let us look at the High Court judgment (Abdull Hamid Embong J's judgment).

[25] It must first be noted from the judgment that, even when the learned judge was repeating the arguments of the learned counsel for Simpang Empat, hardly any new facts were mentioned except that an offer for costs was made in the Simpang Empat No. 2 to meet the indemnity requirement. The learned counsel, from the judgment, appears to be merely rearguing the same issue. The learned judge concluded that the circumstances had not changed in spite of Mr. Sabapathy's attempt to convince him that there was at least one material difference in that an offer for costs was made in Simpang Empat No. 2 to meet the indemnity qualification. However, for the reasons given by him which were reproduced earlier, he held that the offer was a non offer and thus the company's assets remained endangered.

[26] In other words, the learned judge did consider whether there were new circumstances that would justify the directors' decision to relitigate and found that there was none. So, he allowed the preliminary objection.

[27] Let us now look at the judgment of the Court of Appeal. The Court of Appeal made no mention whatsoever of the finding of the High Court judge that the circumstances had not changed at all. Instead, the Court of Appeal relied on *Kimlin (supra)* and in effect, held that because of the decision of this court in *Kimlin (supra)*, all the requirements had been satisfied. In so doing, it purported to rely on the so-called doctrine of *res judicata* in the wider sense.

[28] What did *Kimlin (supra)* decide? It decided that a chargor of land could not by a contract – and a debenture is a contract – exclude the operation of ss. 254 to 265 of the NLC. Was that the issue in both the preliminary objections? Of course it was not, because, at the time this court decided Simpang Empat No. 1 and also when Abdull Hamid Embong J decided the preliminary objection in Simpang Empat No. 2, *Kimlin (supra)* had not been decided yet. Simpang Empat could not use it as a ground in their application as the law as laid down in *Kimlin (supra)* was not in existence yet. That is why the ground given in prayer 1 of the Originating Summons (Simpang Empat No. 2) only resorted to the provisions of s. 340(2)(b) and/or s. 340(4)(b) besides the allegation that the transfer was undertaken in contravention of the express restriction that the land in question "tidak boleh ditukarkan nama, digadai atau dipajak ataupun dijualkan melainkan dengan kelulusan bertulis oleh Menteri Besar Perak."

[29] Of course, s. 340(2)(b) NLC relied on by Simpang Empat includes "insufficient or void instrument". And, if the receivers and managers have no power to sell without resorting to the provisions of the NLC, according to *Kimlin (supra)*, the transfer would be void.

[30] So, does *Kimlin (supra)* have an effect on the preliminary objection? First, in my view, *Kimlin (supra)* cannot retrospectively affect the decision of this court in Simpang Empat No. 1. The reasons are, first, *Kimlin (supra)* is a later decision in a completely different case on a matter which was not an issue in the preliminary objection in Simpang Empat No. 1. It was never an issue in Simpang Empat No. 1 whether a chargee could sell the

charged land without resorting to the NLC. Secondly, even if it was an issue and this court had decided differently in Simpang Empat No. 1, a subsequent decision in *Kimlin (supra)* by this court would not have the effect of reopening the judgment in Simpang Empat No. 1. Simpang Empat No. 1 had been decided. The decision is final. The matter is closed.

[31] But, as I have pointed out, if the effect of *Kimlin (supra)* is to render the sale void, then it may be argued that the registration was effected with an "insufficient or void instrument". (I say "if" because the issue would be an issue to be decided by the High Court if Simpang Empat No. 2 is allowed to proceed and I do not think that I should prejudge the issue and bind the High Court before it has even heard the case). If that is the effect of *Kimlin (supra)*, then it cannot be said that it would not be in the interest of the company for the directors to institute Simpang Empat No. 2. Neither could it be said that it would "impinge prejudicially upon the position of the debenture holders by threatening or imperilling the assets which are the subject of the charge". The Court of Appeal is right on those findings.

[32] But does *Kimlin (supra)* have an effect on Simpang Empat No. 2? The High Court judge could not be faulted for not considering *Kimlin (supra)* because *Kimlin (supra)* had not been decided when the learned judge decided on the preliminary objection. However, by the time the Court of Appeal heard the appeal, *Kimlin's (supra)* decision was already there. It is therefore quite right for the Court of Appeal to take it into consideration. But it should be only for the purpose of deciding the preliminary objection. The final decision on the effect must be left open for the High Court hearing the originating summons (Simpang Empat No. 2) to decide. The court then might also have to consider the effect of *Melantrans Sdn. Bhd. v. Carah Enterprise Sdn. Bhd. & Anor* [2003] 2 CLJ 86.

[33] In my view, there is, at least, an arguable case now that the sale may be void (this is a matter that should be decided by the High Court at the hearing of the originating summons). So, it follows that for the purpose of deciding the preliminary objection, the requirement of the law has been satisfied for the directors to bring the action in Simpang Empat No. 2.

[34] It is clear in my mind that I am not applying *Kimlin (supra)* retrospectively. It would be retrospective if it were applied to reopen Simpang Empat No. 1. But Simpang Empat No. 2 is a new action. Simpang Empat No.1 does not prevent Simpang Empat No. 2 from being filed, because Simpang Empat No. 1 was decided purely on the issue of *locus standi* of the directors, not on the merits, based on the circumstances then.

[35] Regarding the questions posed to this court, the first question arose from the fact that the Court of Appeal had relied on the doctrine of *res judicata* in a wider sense to arrive at its conclusion. However, as I am of the view that in Simpang Empat No. 2 we are not reopening Simpang Empat No. 1 as it is a fresh action which is not prevented from being brought by Simpang Empat No. 1 since Simpang Empat No. 1 was decided only on the issue of *locus standi*, it was completely unnecessary for the Court of Appeal to rely on the doctrine of *res judicata* in the wider sense at all. In the circumstances, I would prefer not to answer Question No. 1 at all.

[36] On question No. 2, as that issue might be an issue in this case in the High Court, I do not think it should be answered yet.

[37] Question No. 3 too need not be answered as it is quite irrelevant to this decision.

[38] In conclusion, I would dismiss the appeal. The order made by the Court of Appeal is hereby affirmed. As regards costs of this appeal, since the respondent's success is not due to their effort in bringing new evidence that there had been a change of circumstances in their favour (indeed they had failed in the High Court) but due to a subsequent intervening event, ie, the judgment of this court in *Kimlin (supra)*, I would order that only half costs be paid by the appellants to the respondent.

[39] My brothers Augustine Paul and Abdul Aziz Mohamad FCJJ have read this judgment and agree with it.